Nos. 53 and 78

# In the Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

WOOSTER DIVISION OF BORG-WARNER CORPORATION

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WOOSTER DIVISION OF BORG-WARNER CORPORATION, *Cross-Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

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**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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### OPINIONS BELOW

The opinion of the court below (R. 512a-523a) is reported at 236 F. 2d 898. The findings of fact, con-

clusions of law, and order of the Board (R. 385a-506a)[1] are reported at 113 NLRB 1288.

## JURISDICTION

The judgment of the court below (R. 511a-512a) was entered on September 12, 1956. The writs were granted on March 26, 1957. 353 U.S. 907.[2] The jurisdiction of this Court rests upon 28 U.S.C. 1254 and Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U.S.C. 160(e).

## QUESTIONS PRESENTED

In the course of bargaining negotiations with the certified bargaining representative of its employees the Company insisted, as conditions precedent to the execution of any agreement, upon the inclusion of two clauses: (1) a "ballot clause" providing that the Union agree not to call a strike or reject the Company's last offer in connection with any dispute under the contract (including the amendment or termination of the contract), except after majority approval of such action in a secret ballot election in which all employees in the bargaining unit, both union and non-union, are permitted to vote; (2) a "recognition clause" naming the Union's local affiliate as the contracting labor organization.

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[1] "R" references are to the printed record. Occasional "G.C. Ex." references are to General Counsel exhibits appearing between pages 74a and 77a of the record. However, the references at p. 6 to "G.C. Ex. 5C" and "G.C. Ex. 4" are to portions of those exhibits which have not been printed; the parties have stipulated that reference may be made to them.

[2] The writ in No. 78 was limited to the first question presented by the cross-petition.

The Board found that such clauses were in derogation of the Union's status as certified bargaining representative and were outside the statutory bargaining area of terms and conditions of employment. Accordingly, the Board concluded that the Company's insistence on the clauses, over the Union's objection, constituted an unlawful refusal to bargain, in violation of Section 8(a)(5) of the National Labor Relations Act. The court below enforced the Board's order with respect to the recognition clause but not with respect to the ballot clause.

1. The question presented in No. 53 is whether the court below erred in holding that the ballot clause was not in derogation of the Union's representative status and was not outside the statutory bargaining area.

2. The question presented in No. 78 is whether the court below properly held that the recognition clause was in derogation of the Union's representative status and was outside the statutory bargaining area.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

### Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents * * *

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of

representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * * * *

## STATEMENT

1. *The facts.*—After winning an election among the employees of the Company, the International Union, United Automobile Workers of America, CIO, was certified by the Board on December 18, 1952, as their exclusive bargaining representative under Section 9 of the Act (R. 388a; 31a-34a). On January 23, 1953, the Union presented a proposed agreement to the Company referring to the Union as "International Union, United Automobile, Aircraft and Agricultural Implement Workers of America and its Local Union No. 1239, U.A.W.-CIO" (R. 475a; 34a, 154a). The Union had chartered the Local shortly after the Board's certification had issued (R. 239a-240a, 388a). On February 9, the Company submitted counterproposals, dealing with so-called non-economic issues, in which it designated the employees' representative as "Local Union 1239, affiliated with the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)" (R.

475a; 36a-39a). The Union's representative, Pappin, told the Company representative, Adams, that this provision (the "recognition clause") "violated the certification of the Board" (R. 476a, 392a; 201a).

The Company's counterproposals contained a further clause providing: (a) that, as part of the procedure "for the settlement of all disputes that may arise," all the employees in the bargaining unit, both union and nonunion, would be permitted to vote by secret ballot on whether to accept or reject the Company's "last offer" and "any subsequent offers made"; (b) that the termination of the agreement be among the issues subject to such ballot; and (c) that on issues not subject to arbitration no strike could be called until the settlement procedure (including majority rejection of the Company's "last offer" and "any subsequent offers made") was completed[3] (R. 475a, 390a-392a; G.C. Ex. 5C). The reaction of Pappin, the Union's representative, to this proposal (the "ballot clause") was that he "won't discuss it" because the Union "wouldn't accept it under any circumstances" (R. 476a, 392a; 177a-178a, 201a, 319a-320a, 330a-331a, G.C. Ex. 22). There was no further discussion of the ballot clause at any of the eight bargaining conferences held between February 16 and March 11 (R. 206a-207a, 210a). The Union's objections to the Company's recognition clause were reiterated on February 16 and March 4. On the latter date, Pappin told Adams that the Union "could not accept an agreement with only the local union as a party to the agreement" (R. 395a; 204a, 209a).

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[3] The Union itself had proposed a ban on strikes over matters subject to arbitration (G.C. Ex. 4, paragraph 45(b)).

On March 11, the Company submitted its economic proposals as the first part of a "Proposal for Settlement." This economic offer was specifically "made contingent on the satisfactory settlement of all other issues" (R. 394a; 42a, 155a). The following day the Company presented, as "Settlement Proposal—Part Two," its views in support of its non-economic proposals, including the recognition and ballot clauses, specifying again that "the economic proposal was offered contingent upon settlement of all non-economic issues within the framework of an outline to be presented separately as the second part of the total 'package proposal'" (R. 394a; 49a, 50a-51a, 155a-156a).[4] Explaining its proposal "that the contract be made between the Local Union and the Company," the latter declared "The Local Union is most familiar with the employees, the operations, the working conditions, and the local community situation. The local union will have to live with the results of these negotiations. Therefore, the local union should have the right to make its own agreement" (R. 49a). The ballot proposal was sought to be justified on the ground that "a well disciplined minority could * * * stack Union meetings and call unwarranted strikes" and that the clause would enable "the Union to protect the majority of the employees and itself against this possibility * * *" (R. 51a).

Following a Union meeting held on March 15, at which the membership rejected the Company's proposals and approved the executive board's recom-

[4] In an open letter to the employees on the same day, the Company again argued its position with respect to its non-economic proposals (R. 80a).

mendation to call a strike on March 20 if no settlement were reached, Pappin informed Adams at a conference on March 17 that if either the recognition clause or the ballot clause were the only issue in dispute, the employees would strike over either one of them alone (R. 395a-396a, 404a; 213a-215a, 334a-335a). Further meetings held on March 18 and 19 produced no solution to the dispute, the Company insisting that its last proposal should be accepted. The Union struck on March 20 (R. 396a; 218-222a).

On March 31 and throughout April, the parties continued to meet, the Company remaining adamant notwithstanding the Union's declaration that the ballot and the recognition clauses were "fundamental to the settlement of the dispute" and its oft-repeated statements that the Company's insistence thereon could be construed "as a refusal to bargain" and "a violation of law" and that the Union would never accept them "under any conditions" (R. 477a, 397a; 170a-171a, 174a, 176a-178a, 222a, 225a, 226a-227a, 234a-235a, 343a-344a, 345a, 355a, G.C. Ex. 17, 22). On April 7, 1953, the Union filed charges with the Board alleging that the Company was engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act (R. 7a). On April 17, the Company extended the applicability of the ballot clause specifically to cover amendment or modification of the contract (R. 477a, 398a-401a; 59a-60a, 232a).

At the same time, the Company made its final proposal regarding the recognition clause, changing the designation of the contracting union from "Local Union 1239, affiliated with the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America" to "Local Union 1239 of

United Automobile, Aircraft and Agricultural Implement Workers of America" (R. 401a; 232a). The Union countered this last proposal with an offer to make its name read "the International, Local 1239" (R. 402a; 233a). However, the intent of both parties remained unchanged, the Union insisting that the International be the primary party and the Company insisting that the primary party be the Local (R. 476a-477a, 402a-403a; 234a, 352a-353a). Blythe, the Company's president and general manager, testified that the Company "did not have to" recognize the International as a party to the contract and that "the position of the company was at all times the agreement would be with the local" (R. 476a-477a, 394a-395a; 175a, 169a).

Finally, on April 21, Pappin asked Adams whether the Company would withdraw its demands concerning the recognition and ballot provisions if the Union acceded to every other proposal of the Company. Adams insisted that the Company's so-called "package" proposal, including the objectionable clauses, be taken "as it is" (R. 477a, 403a; 235a, 324a-325a).

Upon the recommendation of the International, the membership of the Local instructed its bargaining committee on April 25 to accept the best offer it could get from the Company and terminate the strike. With the tacit consent of the International, the Local accepted the Company's terms, and on May 5 entered into the agreement proposed by the Company (R. 478a, 405a; 307a-309a, 360a-364a). By this agreement in terms between the Company and the Local, the Company expressly recognized the latter as "the exclusive bargaining agent" (R. 70a).

2. *The Board's decision and order.*—Upon the foregoing facts, the Board (two members dissenting) found, in relevant part, that the Company "was not merely proposing its recognition and employee ballot clauses as matters which the Union could voluntarily accept or reject," but that it "was adamantly insisting on the inclusion of these two clauses as a condition precedent to the execution of any agreement" (R. 478a). It concluded that such insistence was incompatible with the Company's bargaining obligation under the Act and constituted a refusal to bargain within the meaning of Section 8(a)(5) of the Act.

The Board held that "the Respondent's liability under Section 8(a)(5) turns not upon its good faith, but rather upon the legal question of whether the proposals are obligatory subjects of collective bargaining. For, if the proposals are permissible statutory demands, the Respondent was privileged to adamantly insist upon bargaining as to them and the Union could not refuse to so bargain; on the other hand, if they were not, the converse is true" (R. 478a). To hold otherwise, said the Board, "means, in effect, an amendment to the Act's statement of the required subject of collective bargaining and that [the Union is] required under the Act to bargain about matters wholly unrelated to wages, hours, and other conditions of employment" (R. 479a-480a).

Turning to the two clauses in question, the Board held that fulfillment of the duty "to accord exclusive and unequivocal recognition to the statutory representative * * * is not a subject of obligatory bargaining," and that the Company's recognition clause failed to accord such recognition since it was "in complete derogation of the certificate" which the Board had is-

sued only a few months earlier. Finding that the proposed recognition clause was a matter of substance, not merely one of language, and that the Company was insisting upon executing a contract with the Local to the exclusion of the International, the duly certified bargaining representative, the Board stated (R. 480a-481a):

> The designation of representatives pursuant to a Board election, is the function of this Board. This agency, accordingly, designated and certified the bargaining agent in this case. A demand that the legal status thus obtained be bargained away cannot be countenanced if the purposes of the statute are to be realized. What has been won through the Board's election processes need not be re-won at the bargaining table.

The Board also held that the Company's proposed ballot clause, which in substance prohibited the Union from calling a strike or from amending, modifying, or terminating the agreement without the approval of a majority of the employees, both union and non-union, was not "an obligatory subject of collective bargaining," but rather a purely internal union matter unrelated to any condition of employment. In the Board's view, the ballot clause represented, in essence, an attempt to resolve economic differences by dealing with the employees as individuals contrary to the representative scheme which the Act has established for purposes of collective bargaining. The Board stated (R. 482a-485a):

> In principle, there is little, if any, difference between an employer taking individual proposals directly to the employees and an employer requiring that the bargaining representative obtain ap-

> proval or disapproval of any economic proposal as a condition precedent to the representative's exercise of statutory powers. Either situation is in derogation of the status of the statutory representative and thus violates the exclusive representation concept embodied in the Act.

Based upon the above findings and conclusions, the Board's order in relevant part directs the Company to cease and desist from insisting in bargaining negotiations upon its recognition and employee ballot proposals, or any other proposals not involving terms or conditions of employment. Affirmatively, the order directs the Company to bargain with the certified union upon request, and to post the usual notices (R. 487a-489a; 504a-506a).

3. *The Court of Appeals decision.*—In relevant part, the Court of Appeals upheld the Board's decision with respect to the Company's insistence upon its recognition clause, holding that representative status "is acquired by statute and is not within the area of collective bargaining" (R. 518a). More particularly, the court stated (R. 519a):

> It is a strained construction of the Act to say that the party representing the employees and negotiating such a trade agreement for their benefit is not entitled to complete the job by having the contract which it has negotiated executed with it as the representative of the individual employees for whom it is acting. Such a contract is necessarily executed with a representative of the individual employees. We fail to see the reasoning which would authorize the substitution of the Local, not the official representative of the employees, for the Union which is the official representative of the employees, over the objec-

tion of the Union. The fact that the Union offered to share this right with its Local did not give the Company the right to insist that it relinquish the right completely.

The court disagreed, however, with the Board's decision regarding the ballot clause and set aside that part of the Board's order enjoining the Company from insisting in collective bargaining negotiations on such a clause. The court concluded that the ballot clause was a statutory subject of bargaining, insistence upon which was valid in the absence of bad faith. Noting that a no-strike clause is concededly within the area of compulsory bargaining, the court held that "the qualified no-strike proposal of the Company should not be classified differently" (R. 517a).

## SUMMARY OF ARGUMENT

1. The Act confers upon a representative designated or selected by a majority of the employees in an appropriate unit exclusive status as the bargaining representative of all the employees in the unit. The chosen representative is empowered to act for and bind every employee in the unit on all matters within the field of collective bargaining. Correlatively, an employer is under a duty to bargain collectively with the chosen representative of his employees and to treat with no other. "Bargaining carried on by the employer directly with the employees * * *, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained * * *. [O]rderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees them-

selves, prior to such a revocation." *Medo Photo Corp. v. National Labor Relations Board*, 321 U.S. 678, 683-685.

The Company's ballot proposal, which in effect lodged in the employees effective control over the settlement of disputes within the area of collective bargaining and the utilization of strike sanctions, infringes upon the Union's exclusive status. It would enable the Company to go behind the Union and, in effect, deal with the employees themselves, for under the ballot clause the employees would make the very decisions which the Act contemplates as within the prerogative of the representative. To permit an employer to condition agreement upon such a clause would dilute the representative's authority, diffuse its responsibility, and ultimately dissipate its strength—in short, subvert the collective bargaining process. The only difference between this and *Medo Photo, supra,* is that the employees here would be replying to the Company's last offer at the ballot box rather than at the bargaining table.

It is without significance that the Company did not initially approach the employees directly but instead demanded of the bargaining representative itself to agree to qualify and surrender its exclusive statutory authority to settle disputes or to invoke strike sanctions. The vice is the same in both situations: the end result is to permit the employer to "go behind the designated representatives, in order to bargain with the employees themselves." *Medo Photo, supra.*

Neither the Company's freedom to propose the clause nor the Union's freedom to accept it justifies the Company's insistence upon the clause as the price of agreement. Since the area of compulsory bargain-

ing under the Act is restricted to "terms and conditions of employment", a party may not condition agreement upon matters outside that area. The ballot clause does not relate to terms or conditions of employment within the meaning of the Act. Instead, the right of a bargaining representative to full and exclusive recognition is a benefit conferred by law upon the representative, and, reciprocally, an obligation imposed upon the employer. The extinguishment of that benefit and the correlative obligation is not a subject-matter as to which the Union can be compelled to bargain. A contrary rule would, on the one hand, confer on the employer the option of bargaining concerning the representative's status which the Act establishes as a matter of right and, on the other hand, compel the representative to defend at the bargaining table what it has won through its victory at a Board election.

The absence of any proof of the Company's bad faith in proposing the ballot clause cannot excuse the Company's insistence upon the representative's surrender of a right or benefit conferred by the Act which the clause contemplated. Bad faith is the applicable yardstick where the issue is a term or condition of employment. It does not apply to matters outside the statutory area of compulsory bargaining, such as the right to full and exclusive recognition. This is the decisive distinction between the instant case and *National Labor Relations Board.* v. *American National Insurance Co.*, 343 U.S. 395.

2. Similarly, as the court below held, the Company's insistence on the recognition clause denied the bargaining representative the status to which it was entitled under the Act. The clause would have sub-

stituted the Local for the International, which had been certified as the exclusive representative of the employees. The statutory requirement of "the signed agreement * * * as the final step in the bargaining process" (*H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 525) cannot be satisfied by an agreement to which the certified representative, owed the duty of exclusive recognition and negotiation, is denied the status of a party over its objection. "The status is acquired by statute and is not within the area of collective bargaining" (R. 518a). The clause went far beyond mere matters of form and description of the parties to a collective bargaining agreement which are matters for negotiation; it struck at the very heart of the relationship between an employer and the bargaining representative which the Act envisages.

## ARGUMENT

### THE COMPANY'S INSISTENCE UPON ITS RECOGNITION AND BALLOT CLAUSES AS A CONDITION OF AGREEMENT CONSTITUTED A REFUSAL TO BARGAIN WITH THE UNION IN VIOLATION OF SECTION 8(a)(5) OF THE NATIONAL LABOR RELATIONS ACT

Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."[5] Section 9(a), in turn, declares that—

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay,

[5] Section 8(b)(3) imposes the correlative duty upon a labor organization which is the representative of the employees.

> wages, hours of employment, or other conditions of employment * * *.

Section 9(c) provides for elections to be conducted by the Board for the determination and certification of such majority representatives. Section 8(d) defines "to bargain collectively" as—

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party * * *.

Accordingly, where, as here, the Board has certified a majority representative, the conjunction of these provisions requires the employer to recognize and bargain with such representative, and "with no other", over the terms and conditions of employment. *National Labor Relations Board* v. *Jones & Laughlin Corp.*, 301 U.S. 1, 44. As explained in detail below, the Company, by its insistence on the recognition and ballot clauses as a condition of agreement, sought to compel the Union to surrender its statutory status and thereby deny it the exclusive recognition which the statute makes mandatory.

### A. The Ballot Clause Infringes Upon the Union's Exclusive Representative Status

#### 1. Under the Act, the Duly Designated Bargaining Representative Is Entitled to Full and Exclusive Recognition as the Representative of All the Employees Whom It Represents

The Act confers certain rights and duties on a labor organization designated, either through a Board-

conducted election or less formal procedures, as bargaining representative by the majority of the employees in an appropriate unit. Of primary importance in this connection is the representative's authority, in bargaining with the employer, to act for and bind all the employees in the unit, with a view to consummating a contract governing their working conditions. "Congress has seen fit to clothe [the chosen representative] with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents * * *." *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 202. "The National Labor Relations Act, as passed in 1935 and as amended in 1947," this Court has further observed, "exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives * * *. * * * Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented." *Ford Motor Co. Huffman*, 345 U.S. 330, 337-338.

Such a collective bargaining system presupposes recognition by the employer of the power of the chosen labor representative to exercise its delegated authority to the exclusion of the individual employees. "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. That obligation being exclusive * * * it exacts 'the negative duty to treat with

no other.' * * * Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained * * *. * * * But orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to such a revocation." *Medo Photo Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 683-685.

The representative system which the Act has thus adopted necessarily involves, as the Board pointed out (R. 482a), "trusting the agent with discretion not subject to review by those it represents as to each exercise thereof, particularly at the instance of an outside party."[6] The employees' designation of a collective bargaining representative would in great measure be futile and meaningless if an employer could at any particular stage of the bargaining procedure demand proof that the exclusive representative was acting in accordance with the desires of the employees. By the same token, "The purpose of the statute would be largely frustrated if the results of bargaining must be submitted to a vote of the employees, with all the misunderstandings and cross currents that would inevitably arise in an election of that sort. * * * The statute contemplates the making of agreements by

[6] The accountability of the bargaining agent to those whom it represents for the proper exercise of its authority is, of course, another matter. "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents." *Ford Motor Co.* v. *Huffman, supra*, 345 U.S. at 338.

representatives of the employees, not by the employees themselves, 'giving statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.'" *National Labor Relations Board* v. *Darlington Veneer Co.*, 236 F. 2d 85, 88, 89 (C.A. 4). Accord: *National Labor Relations Board* v. *Corsicana Cotton Mills*, 178 F. 2d 344, 346-347 (C.A. 5).

The nature of the statutory scheme of representation is further underscored by this Court's decision in *Automobile Workers* v. *O'Brien*, 339 U.S. 454. In declaring invalid a state law requiring approval of a majority of the employees before a strike could be deemed lawful, the Court declared (at p. 458): "The federal Act * * * does not require majority authorization for any strike. This requirement of approval by a majority of the employees was contained in the Bill which passed the House of Representatives; but the Act as finally adopted deliberately refrains from imposing the prerequisite of majority approval in each of its references to strike votes" (footnotes omitted).[7]

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[7] The legislative history of the 1947 amendments to the Act sheds additional light on the statutory mechanism and the powers vested in the designated bargaining agent.

The committee hearings disclosed considerable concern over the alleged denial of the democratic rights of employees. *E. g.*: Hearings before the House Committee on Education and Labor on Bills to Amend and Repeal the National Labor Relations Act, and for other Purposes, 80th Cong., 1st Sess., pp. 23, 31, 493, 504, 505-506, 665; Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., pp. 658-659, 1678-1679, 1826-1827, 2148. The report of the House Committee on Education and Labor listed as one of the evils to be corrected that the individual employee "has been denied any voice in arranging the terms of his own employment," and stated that its bill remedied this evil. H. Rep. No. 245, 80th Cong., 1st

In sum, the authority of the designated bargaining agent to speak for and bind those whom it represents with respect to matters falling within the area of collective bargaining is of a plenary character, and the statute does not envisage that the exercise of that au-

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Sess., pp. 4, 7, reprinted in 1 Legislative History of the Labor Management Relations Act, 1947 ("Leg. Hist."), pp. 295, 298. The Declaration of Policy contained in the House Bill included as one of the objectives, "to encourage the peaceful settlement of labor disputes affecting commerce by giving the employees themselves a direct voice in the bargaining arrangements with their employers * * *" H. R. 3020, 80th Cong., 1st Sess., Sec. 1(b), 1 Leg. Hist. 32. By way of implementing this declared policy, the House adopted a provision prohibiting in collective bargaining any strike called without the authorization of a majority of the employees by a vote on the employer's last offer. *Id.*, Sec. 2(11)(B)(vi)(h), 1 Leg. Hist. 39; H. Rep. No. 245, 80th Cong., 1st Sess., pp. 21-22, 69-70, 1 Leg. Hist. 312-313, 360-361. This limitation never found its way into the Act but "was rejected on the merits." *Automobile Workers* v. *O'Brien*, 339 U. S. 454, 458, n. 5. Instead, the House accepted as a substitute for this limitation the provision in Section 8(d) imposing certain conditions on the right to strike, none of which relates in any way to employee approval. See Statement of the Managers on the Part of the House, appended to H. Conference Report No. 510, pp. 30, 34-35, 1 Leg. Hist. 534, 538-539.

At the same time, Congress, in Title II of the Labor Management Relations Act, empowered the Director of the Federal Mediation and Conciliation Service, in mediation situations, to seek to induce the parties voluntarily to agree to a vote of the employees on the employer's last offer, providing, however, that a party's refusal to agree to such procedure "shall not be deemed a violation of any duty or obligation imposed by this Act." Sec. 203(c). Similarly, the strike ballot provided for national emergency disputes has no binding effect. Sec. 209(b).

The lone respect in which the Act required employee approval of the action of bargaining representatives was as to union-security agreements. And even this requirement, contained in Section 8(a)(3), has since been repealed (65 Stat. 601).

thority be subject, at the employer's demand, to a referendum of the employees for approval or disapproval.

**2. The Ballot Clause Is in Derogation of the Bargaining Representative's Statutory Function**

Judged by the foregoing principles, the Company's ballot proposal constitutes "a violation of the essential principle of collective bargaining and an infringement of the Act * * *." *Medo Photo, supra,* at p. 684.

The statutory requirement of full and exclusive recognition is not met where, as here, the employer refuses to accept the representative's determination of the employees' position on certain aspects of the employment relationship. In the final analysis, the ballot clause would enable the Company to deal with the employees themselves, rather than with their representative, with respect to every dispute, not subject to arbitration, arising under the agreement (as well as the termination and modification of the agreement) and with respect to the appropriate means of resolving those issues. Under the clause, it would not be the Union but the employees themselves who would pass upon the Company's offer. And under the clause, it would not be the Union but the employees themselves who would decide whether to strike in order to compel the Company to recede from its position. The proposal in question would, in effect, remove the bargaining representative from exercising any effective control either over the settlement of disputes within the area of collective bargaining or the utilization of strike sanctions.

Of course, it is not unusual for a bargaining representative to call for an employee vote on whether to accept an employer's proposal or to strike or not, but

this is a matter relating to the internal affairs of the representative *vis-a-vis* its constituency.[8] The statute does not, we submit, permit an employer to compel the bargaining representative to surrender, as the price of entering an agreement, the authority and discretion lodged in it by virtue of its exclusive representative status. To permit such a course would dilute the representative's authority, diffuse its responsibility, and ultimately dissipate its strength. In short, it would subvert the collective bargaining process.

It is of no moment that the Company did not initially approach the employees directly but instead demanded of the bargaining representative itself that it agree to qualify and surrender its statutory authority to settle disputes with the Company or to invoke strike sanctions by permitting the employees to make the ultimate decision. This does not cure the essential vice in the Company's insistence upon the proposal. The Company, in effect, sought to compel the Union to bargain over its right to full representative status, notwithstanding its statutory certification. The end result of the Union's yielding to such a demand would be to take effective control of the bargaining with respect to terms and conditions of employment and of strike sanctions out of the hands of the statutory representative and lodge it in the hands of the individual employees. Since under the Company's

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[8] See Peterson, *American Labor Unions* (1952) 155, 173. Over 40 percent of union constitutions which were the subject of two recent independent studies permit strikes to be called without membership approval. National Industrial Conference Board, *Unions' Strike Vote Provisions*, 16 Management Record 186, 188 (May 1954); U.S. Department of Labor, Bureau of Labor Statistics, *Strike-Control Provisions in Union Constitutions*, 77 Monthly Labor Review 497, 498 (May 1954).

proposal any impasse between the Company and the Union could have been resolved against the Union by vote of the individual employees, the Company was in effect insisting, like the employer in *Medo Photo,* that it "go behind the designated representatives, in order to bargain with the employees themselves." This it cannot do.[9]

To illustrate, let us assume that the Union rejects a Company offer of a small wage increase, demanding instead that the Company agree to certain other benefits less immediate but deemed of greater ultimate value, as, for example, a pension plan and seniority provisions. Under *Medo,* it is clear that the Company could neither approach the employees directly, nor even meet with them at their instance, for the purpose of securing acceptance of its offer. It would certainly be inconsistent with this result to hold that the Company could insist upon accomplishing this same purpose through the medium of an employee ballot on whether to accept or reject the Company's offer. The only distinction between this and *Medo* is that here the employees would be replying to the Company's offer at the ballot box rather than across the bargaining table—a distinction wholly without substance. The evil condemned in *Medo* is not avoided by the device of using

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[9] The court below held *Medo* distinguishable on the ground that here "Any requirement that the employees approve the action of the Union would be the result of an agreement with the Union to that effect" (R. 517a-518a). This however, would be true of any condition the employer sought to impose, including one that the contract not be in writing. Indeed, this reasoning is equally applicable to the recognition clause which, the court held, could not be forced upon the Union.

the Union as a mere conduit—or messenger—between the Company and its employees.

**3. The Ballot Clause Is Not a Term or Condition of Employment Within the Meaning of the Act and Hence Is Not Within the Area of Compulsory Bargaining**

The Company asserts, however, that if, as the Board recognized, it is not unlawful for an employer to *make* such a proposal and for a union to accept it, then there is no basis for concluding that an employer may not *insist,* even over the union's objection, upon the proposal as a condition of agreement, just as the employer acting in good faith may adhere to his position with respect to terms and conditions of employment. But, as the Board also pointed out (R. 479a), "we are here concerned not with what the parties might do by mutual consent beyond the obligatory mandate of the statute, but with what the obligation to bargain under the Act requires the parties to do." That statutory obligation is defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached * * *." Sec. 8(d); see also Sec. 9(a). The statute thus defines an area of compulsory bargaining, with both the right and the obligation to bargain collectively extending to every matter within that area. As to subject matter within that defined area—wages, hours and conditions of employment—the parties may insist upon bargaining collectively and, as long as they are acting in good

faith, neither of them is required to agree to a proposal or make concessions. In the absence of bad faith, either party may properly condition agreement upon a matter relating to terms and conditions of employment. See *National Labor Relations Board* v. *American National Ins. Co.*, 343 U.S. 395, 407-409. On the other hand, as the courts have uniformly held, a party may not condition agreement upon a matter *outside* that area.

A few examples will serve to illustrate tl point. Thus, even before Section 8(d) specifically incorporated the requirement of a signed, written contract into the bargaining duty, a party's refusal to execute a written contract breached its duty, notwithstanding the fact that it was free to propose an oral contract and the other party was free to enter into one. *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U.S. 514. Similarly, an employer may propose, and the parties may agree, that a union register under a state statute so as to become suable as an entity, but he may not condition agreement upon such proposal. *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5), certiorari denied, 342 U.S. 824. Nor may the employer condition agreement upon the union's promise to organize his competitors, although he may propose this to the union and the latter may voluntarily accept the undertaking. *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C.A. 3). Or, as the Board pointed out, "a union might propose that an employer reduce the salaries of its officers as a means of obtaining wage increases for employees, and the employer may voluntarily agree, but it does not follow that the employer is required to bargain about such a matter" (R. 479a).

In applying this principle to a ballot clause similar to the clause involved here, the Fourth Circuit stated in *National Labor Relations Board* v. *Darlington Veneer Co.*, 236 F. 2d 85, 88, 89, that while "the mere advancing of such proposals is [not] of itself an unfair labor practice," "the insistence upon such provisions as a condition of entering into any agreement is so unreasonable when objected to by the other party as to furnish of itself a sufficient basis for the finding by the Board of failure to bargain in good faith" because "[i]t is well settled that an employer may not insist upon including as a condition of the contract terms having no relation to the statutory duty to bargain."[10] If the rule were otherwise, a party's right to insist on matters other than terms or conditions of employment would entail a reciprocal duty upon the other party to bargain thereon, with the consequence that the

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[10] See also *Eppinger & Russell Co.*, 56 NLRB 1259 (cited with approval in *Hill* v. *Florida*, 325 U.S. 538, 542) (insistence that union obtain Florida license); *Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. 2d 291, 292 (C.A. 4) (employer's insistence that union withdraw pending charges); *National Labor Relations Board* v. *H. G. Hill Stores*, 140 F. 2d 924, 925-926 (C.A. 5) (same); *American Laundry Machinery Co.* v. *National Labor Relations Board*, 174 F. 2d 124 (C.A. 6), enforcing 76 NLRB 981, 982-983 (same); *Lion Oil Co.* v. *National Labor Relations Board*, (C.A. 8), 40 LRRM 2193 (same); *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. 2d 678, 680-681 (C.A. 6), certiorari denied, 308 U.S. 568 (insistence that union bargain through a local); *National Labor Relations Board* v. *Aldora Mills*, 180 F. 2d 580 (C.A. 5), enforcing 79 NLRB 1, 2 (same); *National Labor Relations Board* v. *Taormina Co.*, 207 F. 2d 251, 254 (C.A. 5) (insistence that union secure consent of parent federation); *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F.2d 713, 719 (C.A. 3) (insistence that union's name be omitted from agreement).

latter's refusal to consider or discuss the matter would violate the statute.

The Company's ballot clause does not relate to terms or conditions of employment within the area of compulsory bargaining as defined by the Act. The right of a bargaining representative to exclusive recognition, with all that it implies, is not itself a term or condition of employment but is, rather, a benefit conferred by law upon the representative and, reciprocally, an obligation imposed upon the employer. The Company's insistence that any agreement arrived at with the Union must contain the ballot clause in effect sought to compel the union to surrender that benefit and relieve the employer of the corresponding statutory obligation. Plainly, the extinguishment of that benefit and correlative duty is not a subject matter as to which the Union can be compelled to bargain. If, as here, the employer may condition agreement upon the Union's waiver of its statutory right to full recognition as the exclusive representative of all the employees in the unit, this is tantamount to conferring upon the employer the option of bargaining concerning the Union's status which the Act establishes as a matter of right. Cf. *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 751 (C.A. 7), certiorari denied, 313 U.S. 565. And, by the same token, the Union is compelled to defend and regain at the bargaining table what it won through its victory at the Board election. Such a conclusion is manifestly at odds with the statutory scheme. The fact that unions, including the one involved in this case, may have on occasion accepted similar ballot proposals does not lessen the force of this argument. A duly designated bargaining agent may not lack capacity to

waive some of its statutory prerogatives. But it is the representative which has that option; the employer cannot, by refusing to bargain further, compel the representative to make such a waiver.

The court below (R. 517a), regarding the ballot proposal as a "qualified no-strike proposal," concluded that it "should not be classified differently" from a no-strike proposal, which the Board acknowledged to be within the statutory bargaining area. Couched in these terms, there is, to be sure, as the Board itself noted (R. 483a), "some appeal in the argument that a strike ballot proposal should also be an obligatory subject [of collective bargaining] as it is less restrictive than a no-strike clause." The argument, however, overlooks the decisive distinction that one proposal seeks to circumvent the exclusive status of the bargaining representative, while the other does not. As the Board explained (R. 484a):

> A no-strike clause involves the employees' right to strike. By virtue of the designation of a statutory bargaining representative, the exercise of this right is entrusted to the representative which has the power to waive it in a contract as a *quid pro quo* and in the interest of industrial harmony. However, the strike ballot clause here, while incidentally limiting the individual's right to strike, is primarily concerned with the mechanics of testing the statutory representative's power to call a strike or to terminate or amend the contract during its term—a purely internal matter unrelated to any condition of employment. Indeed, the strike ballot clause is in essence a procedure designed to force all the employees in the unit, as individuals, to pass upon the [Company's] last offer.

Stated otherwise, although a union can generally be compelled to bargain concerning the relationship of the union (or the employees) *vis-a-vis* the employer (*e.g.*, when the strike weapon should be used), the union cannot be compelled to bargain concerning the relationship of the union *vis-a-vis* the employees (*e.g.*, what intra-union procedures should be used in determining when the strike weapon should be used). As to the latter relationship, the only compulsion that can be exercised against the union (apart from the will of its members) is the force of the underlying statute—not the force of employer bargaining power.

**4. The Company's Good Faith Cannot Excuse Its Infringement of the Union's Exclusive Representative Status**

Finally, relying on this Court's decision in *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, the Company asserts that the ballot proposal was advanced in good faith to protect the employees against the possibility of "unwarranted strikes" (*supra*, p. 7) and that "Congress measured the duty of an employer under Section 8(a)(5) by his good faith and by no other yardstick * * *" (Company's br. in opp. to Board's petition for certiorari, p. 16).

Initially, the union's accountability to those whom it represents is not a matter falling in the area of compulsory bargaining in which the employer has a legally cognizable interest. Here, as in *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 103, the employer, in effect, "seeks to vindicate the rights of his employees." Just as in that case the employer could not, in reliance upon the employees' rights, defeat the statutory obligation to bargain collectively with the duly designated representative, so here the Company

may not escape its obligation to accord the representative full and exclusive recognition on the basis of possible dereliction by the representative in the duty which it owes to those whom it represents. "The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." *Brooks, supra,* at p. 103. The employees themselves are not powerless to make the representative responsive to their legitimate interests. The representative is under an enforcible statutory obligation to make "an honest effort to serve the interests" of all whom it represents and "is responsible to, and owes complete loyalty to" those interests. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337-338. See also *Steele* v. *Louisville & Nashville R. Co.,* 323 U.S. 192, 201-202. The Board itself, in exercising its power to determine and certify bargaining representatives under Section 9 of the Act, has asserted its correlative power to police and revoke certifications in the face of various forms of conduct held incompatible with the representatives' duties. *Hughes Tool Co.,* 104 NLRB 318; National Labor Relations Board, Eighteenth Annual Report, 1953 (Govt. Print. Off. 1954), pp. 19-20. And finally, the employees in the unit, like an electorate, have it within their power to vote the representative out of office. *Brooks, supra.*

In any event, this Court's decision in *American National Insurance, supra,* affords no support for the Company's position. The controlling difference between the two cases is that in *American National* the so-called management functions clause, as the Court saw it and repeatedly emphasized (343 U.S. at pp. 400,

405, 407, 409), did relate to terms and conditions of employment, while the ballot clause in the instant case, as we have demonstrated, does *not* relate to terms and conditions of employment but to a right which the Act vests in the designated bargaining representative. The propriety of an employer's refusal to accord to a bargaining representative the status to which it is entitled as a matter of right cannot be measured in terms of the employer's good faith.

Thus, for example, an employer who, through appropriate procedures available to him under the Act, is challenging the representative status of the certified bargaining agent cannot rely upon his good faith to excuse unilateral action with respect to terms and conditions of employment in derogation of the union's status. *May Stores Co.* v. *National Labor Relations Board,* 326 U.S. 376, 383-384. Nor can an employer who has arrived at an accord with the representative of the employees covering terms and conditions of employment be heard to say that his good faith relieves him of the statutory duty to memorialize it in a written document. *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U.S. 514, 525-526. Nor can an employer's good faith justify his insistence upon recognizing the certified representative merely as the bargaining agent of only its members rather than of all the employees, union or non-union, in the appropriate unit. *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board.* 116 F. 2d 748, 751 (C.A. 7), certiorari denied, 313 U.S. 565. Again, to illustrate further, an employer cannot refuse to bargain collectively over such matters as pension plans or employee stock purchase plans because he in good faith believes that these are not matters relating to terms or conditions

of employment. *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C.A. 7), certiorari denied, 336 U.S. 960; *Richfield Oil Corp.* v. *National Labor Relations Board*, 231 F. 2d 717 (C.A.D.C.), certiorari denied, 351 U.S. 909. Indeed, in *American National* itself, the Court implicitly recognized that the employer's good faith would not have excused his refusal "to bargain over an issue on the erroneous theory that, as a matter of law, such an issue did not involve a 'condition of employment' within the meaning of the Act." 343 U.S. at p. 407, n. 20.

The short of the matter is that the employer's good faith cannot excuse his refusal to accord to his employees or their representative the rights and benefits which the Act confers upon them. Accordingly, if, as we think, the Company's ballot proposal constituted an infringement of the bargaining representative's statutory right to full and exclusive recognition, the Company cannot escape the sanctions of the statute merely because it may have been acting in good faith.[11]

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[11] As noted above, p. 9, the Union ultimately capitulated to the Company's demands concerning the ballot and recognition clauses and an agreement containing those provisions was executed. This settlement, to which the employees succumbed as a result of the Company's unyielding insistence, in no way changes whatever legal consequences attached to the conduct prior to the settlement. As was held in *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 751 (C.A. 7), certiorari denied, 313 U.S. 565, "it could mean nothing more than that the Union, after engaging in a controversy for more than a year regarding its right to complete recognition, consented to accept the most it could obtain of a right to which it was entitled for the asking. A consent given under such circumstances can not be utilized by petitioner to relieve it of its statutory duty to grant complete recognition." Cf. *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947, 949 (C.A. 2); *Dickey* v. *National Labor Relations Board*, 217 F. 2d 652, 655 (C.A. 6).

**B. The Recognition Clause Also Infringes Upon the Union's Exclusive Representative Status**

As shown above, pp. 6-9, the Company insisted, over the Union's strenuous objections, that any agreement arrived at in the negotiations should be incorporated in a contract between the Company and the Local and that the Local be named as the exclusive bargaining agent of the employees, instead of the Union which the Board had certified. The Union ultimately yielded, and the contract which was executed embodied the Company's proposals.

The considerations which apply to the ballot clause and render the Company's insistence upon that proposal violative of the Act (*supra*, pp. 17-33) apply also to its insistence upon the recognition clause. The latter clause, like the former, was in derogation of the Union's representative status which the Board certification formally established and, as the court below correctly concluded (R. 518a), in finding that the Company's insistence upon the recognition clause was unlawful, "This status is acquired by statute and is not within the area of collective bargaining."[12]

It is settled law that a union duly designated as the bargaining representative is entitled not only to exclusive and unequivocal recognition as such representative but also to have any collective bargaining agreement incorporated in a contract signed by the parties and to administer the contract on behalf of the employees whom it represents. Sec. 8(d); *H. J.*

[12] The different results which the court below reached with respect to the two clauses stemmed, we think, from its failure to perceive that both proposals impinged upon, and were in derogation of, the Union's statutory status which the court below acknowledged was not a bargainable matter.

*Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 525; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330. The statutory requirement of "the signed agreement * * * as the final step in the bargaining process" (*Heinz, supra*, at p. 525) cannot be satisfied by an agreement to which the certified representative, owed the duty of exclusive recognition and negotiation, is denied the status of a party over its objection. It bears emphasis that such a demand, like the ballot clause, means that the union must lay on the bargaining table the status which its victory at the Board-conducted election has gained for it as a matter of right. The statute clearly does not countenance such an incongruous result. As the court below observed (R. 519a), "It is a strained construction of the Act to say that the party representing the employees and negotiating [the collective bargaining] agreement for their benefit is not entitled to complete the job by having the contract which it has negotiated executed with it as the representative of the individual employees for whom it is acting."

The instant case does not differ essentially from *Douds* v. *International Longshoremen's Association*, 241 F. 2d 278 (C.A. 2), where the representative insisted over the employer's objection on bargaining with respect to a different unit of employees from the one certified by the Board as appropriate. Holding that the union's insistence was violative of the Act, the Second Circuit stated, in language which fits the Company's refusal to accord to the Union the recognition to which it was entitled under the Board's certification (241 F. 2d at 282, 283):

> This distinction between private bargaining over conditions of employment and administra-

tive determination of the unit appropriate for bargaining is clear. The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining. That question is for the Board to decide on a petition under Section 9(c) of the Act, and its decision is conclusive on the parties, cf. Brown, for and on behalf of National Labor Relations Board v. Pacific Tel. & Tel. Co., 9 Cir., 218 F. 2d 542, 544, although the decision may subsequently be changed.

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The process of change not permitted by the Act is one that denies the Board this ultimate control of the bargaining unit and disrupts the bargaining process itself. This is precisely what occurs when, after the Board has decided what the appropriate bargaining unit is, one party over the objection of the other demands a change in that unit. Such a demand interferes with the required bargaining "with respect to rates of pay, wages, hours and conditions of employment" in a manner excluded by the Act. It is thus a refusal to bargain in good faith within the meaning of Section 8(b)(3).[13]

The Company asserts, however, that since the statutory duty to bargain collectively extends to "the nego-

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[13] Accord, *National Labor Relations Board* v. *Retail Clerk's Int'l Ass'n*, 203 F. 2d 165, 169-170 (C.A. 9); cf. *National Labor Relations Board* v. *Taormina Co.*, 207 F. 2d 251, 254 (C.A. 5); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 751, 752 (C.A. 7), certiorari denied, 313 U.S. 565; *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. 2d 713, 719 (C.A. 3); *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. 2d 678, 680-681 (C.A. 6), certiorari denied, 308 U.S. 568; *National Labor Relations Board* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 403 (C.A. 2), certiorari denied, 347 U.S. 953.

tiation of an agreement" (Sec. 8(d)), then "the form the contract should take and how the parties to it should be described" are bargainable issues (Cross-Pet. 15-16). But it seems too plain for argument that the recognition clause on which the Company successfully insisted was not a mere matter of form or description of the parties to the contract. It was, rather, as the court below correctly stated (R. 519a), "the substitution of the Local, not the official representative of the employees, for the Union, which is the official representative of the employees, over the objection of the Union."

Nor can the basic significance of the recognition clause be obscured by the Company's contention that the difference between the respective recognition clauses proposed by it and the Union was "simply one of emphasis" (Cross-Pet. 15, 16). The Union's proposal, as the Board found (R. 481a), merely included "the Local as a co-party to the contract * * *." This is not an uncommon practice and, moreover, the Company was as free to reject the proposal as the Union to make it. But, the Company's proposal, as the Board also found with the approval of the court below (R. 481a), went to the heart of the relationship between an employer and the bargaining representative which the Act contemplates. The Company "adamantly refused to sign any agreement which even included the certified representative as a party thereto," and the purpose of the clause was to substitute the Local for the Union as the exclusive bargaining representative of the employees. It is no answer to say, as does the Company (Cross-Pet. 16-19), that it negotiated the contract with the certified representative and that its insistence on the recognition clause

was merely to enable the Local, which allegedly had greater familiarity with the immediate plant problems, to administer the contract. The administration of a collective bargaining agreement, no less than its consummation, is the prerogative of the duly designated representative of the employees. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-338; *Order of Railroad Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 346-347; cf. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96. And, as the court below pointed out (R. 519a), "the fact that the Union offered to share the right with its Local did not give the Company the right to insist that it relinquish the right completely."

## CONCLUSION

For the reasons stated, the judgment of the court below in No. 53 should be reversed and the cause remanded with direction to enforce the Board's order, and the judgment in No. 78 should be affirmed.

Respectfully submitted.

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